IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

PAULA R. KAMMAN,
Petitioner Employee,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

ALBERTSONS LLC,
Respondent Employer,

AMERICAN ZURICH INSURANCE CO.,
Respondent Insurer.

No. 2 CA-IC 2018-0005
Filed November 16, 2018

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);
Ariz. R. Spec. Act. 10(k).

Special Action – Industrial Commission
ICA Claim No. 20152380178
Insurer No. W14074950001
Jacqueline Wohl, Administrative Law Judge

AWARD SET ASIDE

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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Eppich and Chief Judge Eckerstrom concurred.

V Á S Q U E Z, Presiding Judge:

¶1 In this statutory special action, petitioner Paula Kamman challenges the administrative law judge's ("ALJ") award for unscheduled permanent partial disability benefits. Kamman contends the ALJ erred by failing to make sufficient findings about whether her post-injury job was sheltered employment. We agree and set aside the award.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to affirming the ALJ's findings and award. *Munoz v. Indus. Comm'n*, 234 Ariz. 145, ¶ 2 (App. 2014). In August 2015, Kamman was working as a baker at Albertsons grocery store when she fell and injured her ankle, hip, and lower back. Albertsons' insurance carrier, American Zurich Insurance Co., accepted the claim, and Kamman received lost wages and supportive medical benefits.

¶3 Kamman returned to work in April 2016 with permanent physical restrictions. Because those restrictions effectively meant she could no longer work as a baker or full time, her managers created a new part-time job for her in which she opened the bakery in the morning, performed packaging and labeling tasks, and greeted customers. Kamman continued earning her pre-injury hourly wage.

¶4 In February 2017, the Industrial Commission issued its Findings and Award for Unscheduled Permanent Partial Disability, awarding Kamman $753.70 per month as compensation for her loss in

earning capacity ("LEC"). American and Albertsons (collectively "American") then requested a hearing before an ALJ, challenging the Commission's calculation of Kamman's earning capacity.

¶5 At the hearing, American argued that Kamman's actual earnings with Albertsons were presumptively her earning capacity and she was entitled to a smaller award because she worked more hours than the Commission credited her. Kamman countered, however, that her post-injury position with Albertsons could not be found in the competitive marketplace and therefore her earnings from it could not be considered when determining her earning capacity. The parties presented testimony from Kamman, her labor-market expert Ruth Van Vleet, and American's expert Lisa Clapp and submitted the experts' written reports. The ALJ, relying on Clapp's calculations based on Kamman's post-injury position at Albertsons, awarded Kamman $625.87 per month.

¶6 Kamman timely requested administrative review, and the ALJ summarily affirmed her award. Kamman then sought special-action relief with this court. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2), 23-951(A), and Rule 10, Ariz. R. P. Spec. Act.

Discussion

¶7 Kamman argues the ALJ erred by relying on Kamman's post-injury earnings "without analyzing whether those . . . earnings were from 'sheltered' employment." She thus contends the ALJ made insufficient findings on the material facts and issues, requiring that the award be set aside. We defer to an ALJ's factual findings, but review its legal conclusions de novo. *Landon v. Indus. Comm'n*, 240 Ariz. 21, ¶ 9 (App. 2016). "An ALJ must include findings on all material issues in the award." *Id.* A lack of findings on any particular issue "does not invalidate an award per se," but we will set it aside if "we cannot determine the factual basis of [the] conclusion or whether it was legally sound." *Post v. Indus. Comm'n*, 160 Ariz. 4, 7 (1989).

¶8 Below, neither party disputed Kamman's work restrictions nor that she was entitled to an LEC determination and award. The only issue before the ALJ was whether Kamman's post-injury position at Albertsons should have been considered in establishing the amount of the award.

¶9 "In establishing an LEC, the object is to determine as nearly as possible whether the claimant can sell [her] services in the open, competitive labor market and for how much." *Kelly Servs. v. Indus. Comm'n*,

210 Ariz. 16, ¶ 8 (App. 2005); *see also Doles v. Indus. Comm'n*, 167 Ariz. 604, 607 (App. 1990) (LEC determination "must be measured by competition in the open labor market"). Pursuant to A.R.S. § 23-1044(D), the ALJ must consider, "among other things," (1) any previous disabilities, (2) the claimant's occupational history, (3) "the nature and extent of the physical disability," (4) the claimant's ability to perform certain types of work post-injury, (5) post-injury wages, and (6) the claimant's age at the time of injury. *See Landon*, 240 Ariz. 21, ¶ 20. Generally, "actual post-injury earnings will create a presumption of commensurate earning capacity," but the claimant can overcome this presumption with "evidence showing that the actual earnings do not fairly reflect claimant's earning capacity." *Maricopa County v. Indus. Comm'n*, 145 Ariz. 14, 19 (App. 1985); *see also Kelly Servs.*, 210 Ariz. 16, ¶ 8.

¶10 "Sheltered" employment occurs when an employer retains a permanently disabled employee at their pre-injury wage but in a position that has been specially created for the employee to accommodate his or her injuries. *See Allen v. Indus. Comm'n*, 87 Ariz. 56, 58-59, 67-68 (1959); *see also Doles*, 167 Ariz. at 606-07. Sheltered employment must not be considered in an LEC determination because it does not reflect the claimant's "earning capacity in a competitive situation but rather a company policy which, if abrogated for any reason by the employer, will force the employee into a position where he will be unable, because of his injuries, to continue to earn such wages or to secure equivalent employment."[1] *Allen*, 87 Ariz. at 68; *see also Rent A Ctr. v. Indus. Comm'n*, 191 Ariz. 406, ¶ 8 (App. 1998); *Doles*, 167

[1] American, both before the ALJ and in its answering brief, characterize sheltered work as, essentially, a "fake job" provided by a "benevolent employer" that provides no real value to the employer. This is not accurate and mischaracterizes the appropriate analysis. In *Doles*, for example, the claimant worked as a physical therapist before her injuries, and after her injury was offered a new, modified position with her employer that "capitalized on [her] experience and skill" and allowed other therapists to spend more time with their patients. However, because the evidence showed that position was available only to the claimant and not available in the competitive marketplace, this court concluded the ALJ erred in relying on those post-injury earnings and set aside the award. *Id.* at 605, 609. In analyzing whether a position qualifies as sheltered work, the essential issue is not whether that job does or does not provide real value to the employer. Instead, it is whether the claimant can find suitable work in the open, competitive labor market, and how much they would earn. *See id.* at 606; *see also Kelly Servs.*, 210 Ariz. 16, ¶ 8.

Ariz. at 607-08. Similarly, "[w]ages paid . . . out of sympathy, or in consideration of [the claimant's] long service with the employer, clearly do not reflect his actual earning capacity, and, for purposes of determin[in]g permanent disability are to be discounted accordingly." *Allen*, 87 Ariz. at 65 (quoting 2 Arthur Larson, *Workmen's Compensation* § 57.34 (1952)).

¶11 At the time of her injury, Kamman was fifty-three years old and had been employed by Albertsons for about seventeen years, working her way up from cleaner to master baker. She was earning $16.06 per hour and working about thirty-two hours each week. She did not have a high school diploma or G.E.D. certificate. After her injuries, doctors restricted her to "four hours per day with sitting and rest breaks as necessary, with no squatting, climbing, or lifting greater than 30 pounds." Although she could no longer work as a baker, or full time, with those restrictions, her managers "worked out" a job for her, in which she opened the bakery in the morning, greeted customers, wrote on cakes, and packaged and put products on display. Although the new position was effectively an "entry-level" job, she continued to receive her pre-injury hourly wage.

¶12 Neither Van Vleet nor Clapp could identify an available position at other Albertsons locations or at other bakeries that matched Kamman's post-injury job. Rather, each position for a baker required heavy lifting and other physical demands beyond Kamman's capabilities. American's expert testified, however, that when she explained Kamman's background to the other employers and the accommodation Albertsons provided, they stated they would give her "equal consideration" if she were to apply. The positions paid between ten and thirteen dollars per hour. Both Van Vleet and Clapp also agreed the other viable position for Kamman would be as a parking lot cashier, which paid around eight dollars per hour at the time of her injury.

¶13 In the award, the ALJ summarized the undisputed facts and the two experts' opinions and pointed out that there was a dispute over whether Kamman could, in fact, work as a baker at other bakeries based on her physical limitations. It noted Kamman had contended her position was sheltered employment, but it found she "is actually working in [her current] position and is capable of doing this work." It then adopted Clapp's calculations for Kamman's LEC award based on her current $16.06 salary.

¶14 We do not address whether Kamman's position was, in fact, sheltered work because the ALJ's award lacks the required findings to enable this review. Although several of the factors in § 23-1044(D) are mentioned in the ALJ's summary of the evidence, there is no indication in

the award that she considered them when making her determination; indeed, it does not even contain a reference to § 23-1044(D). And the ALJ's statement that Kamman was "actually working in [her current] position" is not the correct standard for determining whether Kamman could find suitable work elsewhere. *See Kelly Servs.*, 210 Ariz. 16, ¶ 8; *see also Doles*, 167 Ariz. at 606 ("essential issue . . . not whether claimant can physically perform the proffered work, but whether the work accurately measures claimant's earning capacity in a competitive labor market"). That statement also fails to address whether Kamman had met her burden of demonstrating her actual earnings were not indicative of her earning capacity. *See Kelly Servs.*, 210 Ariz. 16, ¶ 8.

¶15 Furthermore, the ALJ did not resolve the dispute between the two experts over a key fact: Whether Kamman was capable of being hired as a baker, given her current limitations, at other bakeries. *See Post*, 160 Ariz. at 8 (ALJ has duty to resolve conflicting expert testimony and relay that conclusion). Indeed, there are no credibility findings in the award at all. *Cf. Douglas Auto & Equip. v. Indus. Comm'n*, 202 Ariz. 345, ¶ 11 (2002) (sufficient findings where ALJ expressly concluded "all conflicts in testimony would be resolved" in particular expert's favor and express credibility determination on material fact). In sum, without findings that specifically address Kamman's earning capacity and the factors relating to it, we are unable to determine whether the ALJ erred by calculating Kamman's LEC based on her current position and wage at Albertsons. *See Landon*, 240 Ariz. 21, ¶ 25.

¶16 American asserts that the necessary findings are implicit based on the ALJ's adoption of Clapp's LEC calculation. We disagree. "Although findings need not be exhaustive, they cannot simply state conclusions." *Douglas Auto & Equip.*, 202 Ariz. 345, ¶ 9. Here, the award lacks any factual findings that would allow this court to "glean the basis for the [ALJ's] conclusions." *Id.* The award contains "no stated resolution of conflicting testimony, no findings of ultimate fact, and no conclusions on the legal issues." *Post*, 160 Ariz. at 8. Consequently, affirming the ALJ's award would require this court to speculate about the basis of the award

and act as fact-finder, something we will not do.[2] *See id.* at 7. Accordingly, we must set it aside.[3] *See id.* at 7, 9; *see also Landon*, 240 Ariz. 21, ¶ 26.

Disposition

¶17 For the foregoing reasons, we set aside the award.

[2] Although Clapp testified that the employers she had surveyed stated they would "consider[]" Kamman for a position with her restrictions, those same employers told Van Vleet that Kamman would not qualify based solely on her physical restrictions. The employers also stated that for each open position, they received anywhere from five to seven qualified applicants. Clapp also testified that Albertsons had accommodated Kamman's restrictions based on her long employment with them and as "someone that they have invested a lot of time with." Finally, the open baker positions paid only ten to thirteen dollars per hour, less than Kamman is currently making at Albertsons. The evidence thus suggests that Kamman is not, in fact, capable of commanding sixteen dollars per hour as a baker in the competitive marketplace. We point this out, however, only to reject American's contention that the ALJ's conclusion is supported by a "plethora of evidence." We do not make any conclusions as to whether Kamman's position at Albertsons qualifies as sheltered work.

[3] Because we are setting aside the award for a lack of sufficient findings, we need not address Kamman's alternative argument that the ALJ failed to consider whether her position with Albertsons was an accommodation under the Americans with Disabilities Act and the applicability of A.R.S. § 23-1048(A).